KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900

FACSIMILE
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
JEFFREY A. LAMKEN
AUSTIN C. SCHLICK

July 7, 1997

BY HAND DELIVERY

William Caton
Office of the Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

Re: MCI's Petition for Expedited Declaratory Ruling Regarding Preemption of the Arkansas Telecommunications Regulatory Act of 1997 -- CC Docket No. 97-100

Dear Mr. Caton:

Please find enclosed for filing the original together with fifteen copies of the Comments of Southwestern Bell Telephone Company. We are also sending one copy of these Comments to Janice Myles, Common Carrier Bureau, and to ITS, Inc., as requested by the Commission in its Public Notice of June 6, 1997.

Please stamp and return the extra copy to the messenger.

Sincerely,

Michael K. Kellogg

Enclosures

Before the
Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
MCI Telecommunications Corporation's	)	CC Docket No. 97-100
Petition for Expedited Declaratory Ruling	)	
Regarding Preemption of the Arkansas Tele-	)	
communications Regulatory Reform Act of 1997	)	

COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY

GARRY S. WANN
1111 West Capitol, Room 1005
P.O. Box 1611
Little Rock, AR 72203
(501) 373-5676

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
One Bell Center, Room 3520
St. Louis, MO 63101
(314) 235-4300

Of Counsel:

JAMES D. ELLIS
ROBERT M. LYNCH
175 E. Houston, Room 1262
San Antonio, TX 78205
(210) 351-3300

MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
GEOFFREY M. KLINEBERG
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000W
Washington, D.C. 20005
(202) 326-7900

MARTIN E. GRAMBOW
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8868

Attorneys for Southwestern Bell Telephone Company

July 7, 1997

TABLE OF CONTENTS

SUMMARY

In an apparent attempt to bypass the time limits for submitting comments on American Communications Services, Inc.'s ("ACSI's") preemption petition, MCI Telecommunications Corporation ("MCI") has now filed a separate petition seeking preemption of the same provisions of the Arkansas Telecommunications Regulatory Reform Act of 1997 ("Arkansas Act") for the same reasons. As a result of MCI's flouting of the Commission's schedule established in the April 3, 1997, Public Notice, both the Commission and the other interested parties must now expend additional resources responding to arguments that could have been (and, in most cases, were) raised in the earlier comment round.

MCI argues first that certain resale restrictions permitted by the Arkansas Act conflict with section 251(c)(4) of the federal Communications Act and with this Commission's regulations. But as Southwestern Bell Telephone Company ("SWBT") explained in its reply comments on ACSI's petition, no such conflict exists: both Congress and the Commission have recognized that there may be reasonable restrictions on promotions and discounts, and they delegated the determination of what those restrictions should be to the states.

Second, MCI argues that the standards for approving negotiated agreements and statements of generally available terms and conditions under the Arkansas Act are different from those provided for in section 251. But any conflict between the standards of the Arkansas Act and the federal Communications Act could arise only in a case-specific application of the standards to a particular agreement or statement of generally available terms; at least in the context of a facial challenge to the Arkansas Act, these standards are clearly not in conflict with one another.

Third, MCI argues that the criteria and procedures for exempting rural telephone companies from certain interconnection obligations are inconsistent with section 251(f) and this Commission's regulations. But here, too, MCI has assumed a conflict where none exists. The Arkansas General Assembly has carefully ensured that the provisions of the Arkansas Act governing rural telephone companies are compatible with federal requirements.

Fourth, MCI repeats the arguments of ACSI that the Arkansas Act's universal service mechanism is inconsistent with the requirements of sections 214(e) and 254 of the federal Communications Act. But as SWBT has already discussed in response to ACSI, the Arkansas Universal Service Fund is entirely separate from all federal universal support mechanisms. Any differences in how the two schemes are funded or in how eligible telecommunications providers are defined do not create a conflict.

Finally, MCI mimics ACSI's argument that this Commission should take over the functions of the Arkansas Public Service Commission ("Arkansas PSC") because the Arkansas PSC has "fail[ed] to act" within the meaning of section 252(e)(5). According to this argument, the Arkansas PSC has failed to act because the Arkansas Act has somehow deprived it of the ability to carry out the responsibilities of a State commission under federal law. But MCI's argument is entirely hypothetical; the Arkansas PSC has not failed to do anything required of it under federal law, and MCI has not alleged otherwise. MCI, like ACSI before it, completely misunderstands the purpose of section 252(e)(5).

MCI has succeeded in doing nothing more than identifying a few provisions of the Arkansas Act that are different from similar provisions in the federal Communications Act. But these differences are not conflicts. MCI seeks to invoke this Commission's authority under

section 253(d), which authorizes preemption of state laws that have the effect of prohibiting the ability of an entity to provide any telecommunications service, without even attempting to demonstrate how any of the identified provisions of the Arkansas Act actually has such an effect. This Commission should deny MCI's petition for declaratory relief.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MCI Telecommunications Corporation's	)	CC Docket No. 97-100
Petition for Expedited Declaratory Ruling	)	
Regarding Preemption of the Arkansas Tele-	)	
communications Regulatory Reform Act of 1997	)	

COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY

INTRODUCTION

MCI begins its petition by deliberately misquoting the standard for preemption under section 253: according to MCI, this Commission has the power to preempt any state legal requirement that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[1] MCI would like to believe that this Commission is authorized to preempt any state law that might possibly have the effect of one day prohibiting it from providing a telecommunications service. But that is not the provision that Congress enacted. When the entire sentence is read, it is clear that Congress used the word "may" to mean permission rather than possibility: "No State or local statute or regulation . . . may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[2] It is not sufficient for preemption under section 253 for

[1]MCI Petition at 1, 13; see also AT&T Comments on ACSI Petition at 5.

[2]47 U.S.C. § 253(a) (emphasis added).

an entity merely to speculate that a state statute "may" prohibit it from providing a telecommunications service; a party must demonstrate that a particular law when applied in a particular case actually would have the effect of prohibiting the provision of a telecommunications service. MCI has not explained how any of the provisions of the Arkansas Act would have such an effect.

Since it clearly cannot succeed in its quest for preemption under section 253, MCI must instead rely on general preemption law grounded in the Supremacy Clause. Under settled principles, preemption may occur when there is outright or actual conflict between federal and state law,[3] where inconsistent state regulation negates valid federal goals,[4] or where compliance with both federal and state law is not possible as a practical matter.[5] But MCI cannot succeed on a "facial challenge" to a state statute unless it can demonstrate that there is no possible way for the Arkansas Act to be applied in a manner that would not conflict with federal law.[6] MCI has not even tried to make such a demonstration, much less carried its burden of proving that the provisions of the Arkansas Act it has identified can only be applied in such a way that they conflict with the requirements of federal law. In fact, all of the provisions identified by MCI can easily be

---

[3]Free v. Bland, 369 U.S. 663, 666 (1962).

[4]Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 116 (D.C. Cir. 1989).

[5]Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368 (1986); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

[6]See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987) (party making a facial challenge to state regulations based on preemption required to demonstrate "that there is no possible set of conditions [the State] could place on its permit that would not conflict with federal law — that any state permit requirement is per se preempted"); Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941, 943 (9th Cir.), cert. denied, 506 U.S. 825 (1992).

applied without conflicting with the federal Communications Act. Whether or not there are circumstances in which the Arkansas Act might run afoul of federal requirements, MCI has not presented such circumstances here. Indeed, MCI's petition is remarkable for the complete absence of any facts whatsover.

ARGUMENT

In its petition, MCI argues that it is entitled to a declaratory ruling that various provisions of the Arkansas Act are preempted because they conflict with federal law. Furthermore, MCI argues that this Commission should preempt the Arkansas PSC's jurisdiction over all arbitrations conducted under section 252 because the Arkansas Act prohibits the Arkansas PSC from carrying out its responsibilities under the federal Communications Act. For the reasons discussed below, this Commission should deny MCI's petition.

I. There is No Conflict With Respect to the Resale Provisions of the Arkansas Act

MCI cites several subsections of the Arkansas Act relating to the availability and pricing of resale services that supposedly contravene federal requirements. Upon examination, however, none of these alleged conflicts exists.

A. Section 9(d)

MCI purports to find a conflict between section 9(d) of the Arkansas Act, which provides that "[p]romotional prices, service packages, trial offerings, or temporary discounts offered by the local exchange carrier to its end-user customers are not required to be available for resale,"[7] and section 251(c)(4)'s requirement that an incumbent LEC "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not

[7]Arkansas Act § 9(d).

telecommunications carriers."[8] Although this Commission concluded that "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs,"[9] it recognized that "there may be reasonable restrictions on promotions and discounts."[10] In particular, this Commission acknowledged that "promotions that are limited in length may serve procompetitive ends through enhancing marketing and sales-based competition."[11]

MCI's facial challenge to section 9(d) cannot succeed for the simple reason that the express terms of the Arkansas Act — "[p]romotional prices, service packages, trial offerings, or temporary discounts" — when read as a whole appear to contemplate "promotions that are limited in length." Certainly, MCI has not identified any interpretive ruling or regulation that requires the words of the Arkansas Act to be read in such a way as to conflict with the text of the federal statute or with this Commission's First Report and Order. Unless and until MCI can demonstrate that the Arkansas Act has denied it the ability to resell a particular promotion or service package that would have been available for resale under federal standards, its claims of injury amount to nothing but pure speculation.

---

[8]47 U.S.C. § 251(c)(4)(A).

[9]First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15,499, 15,970 [¶ 948] (1996), modified on reconsideration, 11 FCC Rcd 13,042 (1996), petition for review pending sub nom. Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. filed Sept. 6, 1996), partial stay granted 109 F.3d 418 (8th Cir. 1996) ("First Report and Order") (emphasis added).

[10]Id. at 15,971 [¶ 952].

[11]Id. at 15,970 [¶ 949].

B. Section 9(g)

Section 9(g) of the Arkansas Act provides that the wholesale rate is to be calculated by subtracting "net avoided costs due to the resale" from the retail rate of the service. The "net avoided costs" consist of "the total of the costs that will not be incurred by the local exchange carrier due to it[s] selling the service for resale less any additional costs that will be incurred as a result of selling the service for the purpose of resale."[12] MCI argues that this provision conflicts with section 252(d)(3) which, according to MCI, "does not allow for any consideration of additional costs that are purportedly incurred when the ILEC sells services at wholesale rates for resale."[13]

Once again, MCI has imagined a conflict where none exists. Nothing in section 252(d)(3) prohibits a state from concluding that the term "avoided" costs means what it says — costs that are actually avoided when services are sold to resellers instead of to end-users. The Arkansas General Assembly simply recognized that certain costs associated with a telecommunications service may not in fact be avoided merely because the service is being provided to a reseller as opposed to a retail customer. Certain advertising and marketing costs, for example, will continue to be incurred regardless of the customer to whom the incumbent LEC is directly selling its services. These costs, by definition, will not be avoided. It is immaterial whether these costs are described as "additional costs" that will be incurred by the LEC when reselling its services or as

---

[12]Arkansas Act § 9(g).

[13]MCI Petition at 8. MCI alleges that section 9(g) of the Arkansas Act conflicts only with the federal Communications Act, not with this Commission's rules that are currently under review by the Eighth Circuit in Iowa Utilities Board v. FCC, No. 96-3221 (8th Cir. filed Sept. 6, 1996), partial stay granted 109 F.3d 418 (8th Cir. 1996).

traditional costs that will not be avoided by the LEC when reselling its services. Unless and until MCI can demonstrate that the Arkansas PSC has set a particular wholesale rate that is too high because it includes a cost that cannot possibly be considered to be an unavoided portion of the retail rate, it has no basis for claiming that section 9(g) conflicts with any federal requirement.

II. The Standards for Approving Negotiated Agreements and Statements of Generally Available Terms are Compatible with the Communications Act

Section 9(i) of the Arkansas Act provides that the Arkansas PSC "shall approve any negotiated interconnection agreement or statement of generally available terms filed pursuant to the Federal Act unless it is shown by clear and convincing evidence that the agreement or statement does not meet the minimum requirements of Section 251 of the Federal Act (47 USC 251)."[14] MCI argues that this provision conflicts with federal law in several ways: it fails to list incompatibility with section 252(d) and this Commission's regulations as grounds for rejecting a statement of generally available terms; it allegedly alters the level of scrutiny by requiring the Arkansas PSC to accept a statement of generally available terms unless "it can demonstrate by clear and convincing evidence that it violates § 251";[15] and it allegedly eliminates the grounds for rejecting a negotiated agreement found in section 252(e)(2) — namely, that the negotiated agreement either discriminates against a non-party or that it is not consistent with the public interest, convenience, and necessity. Once again, MCI's arguments are entirely unfounded.

[14]Arkansas Act § 9(i).

[15]MCI Petition at 9 (emphasis removed).

A. Grounds for Rejecting a Statement of Generally Available Terms

The Arkansas Act provides that the Arkansas PSC shall approve a statement of generally available terms unless it is shown by clear and convincing evidence that the statement does not meet the minimum requirements of section 251. The Communications Act provides that a State commission may not approve such a statement unless it complies with sections 251, 252(d), and regulations promulgated thereunder. There is no question that the Arkansas Act and the federal Communications Act approach the question of approving a statement of generally available terms in different ways, but that does not make the two provisions inconsistent with one another. While it is certainly possible to imagine a particular statement of generally available terms that would be approved under the Arkansas Act that might not satisfy the requirements of federal law, it is equally easy to imagine a statement of generally available terms that would be approved under either standard. In other words, whether or not a conflict exists can only be determined through a case-specific application of the Arkansas Act to a particular statement of generally available terms.

B. The Level of Scrutiny

MCI insists that the Arkansas Act has made it too difficult to reject a statement of generally available terms, for the Arkansas PSC must approve a statement unless it is shown by "clear and convincing evidence" that the statement does meet the requirements of section 251. But once again, the question is whether, in the context of a facial challenge, MCI has succeeded in demonstrating that it is not possible for the Arkansas Act ever to be applied in a way that does not conflict with federal law. MCI has not even attempted such a demonstration.

It is obvious that there is no necessary conflict between the Arkansas Act and section 252(f)(2). The Supreme Court has explained that competing presumptions and burdens of proof come down to the question of who "bears the risk of equipoise."[16] Were the Arkansas PSC to find, for example, that an incumbent LEC has affirmatively demonstrated that its statement of generally available terms complies with the requirements of federal law, no conflict would arise between the state and federal standards. Indeed, the Arkansas PSC is currently evaluating SWBT's statement of generally available terms. MCI's effort to have section 9(i) preempted is therefore nothing but an end run around ongoing proceedings before the Arkansas PSC.

C. Review of Negotiated Agreements

Under section 252(e)(2), a State commission may only reject a negotiated agreement if it finds that the agreement discriminates against a telecommunications carrier not a party to the agreement or if the implementation of the agreement is inconsistent with the public interest, convenience, and necessity.[17] Section 9(i) of the Arkansas Act, as already discussed, provides that the Arkansas PSC may only reject a negotiated agreement if it finds "by clear and convincing evidence that the agreement . . . does not meet the minimum requirements of Section 251."[18] Among the minimum requirements of Section 251 is that the rates, terms, and conditions of any agreement be just, reasonable, and nondiscriminatory.[19] By conditioning the approval of a negotiated agreement on the satisfaction of the minimum requirements of section 251, the

---

[16]O'Neal v. McAninch, 115 S. Ct. 992, 998 (1995).

[17]47 U.S.C. § 252(e)(2).

[18]Arkansas Act § 9(i).

[19]See 47 U.S.C. § 251(c)(2)(D), (c)(3), (c)(6).

Arkansas Act has gone at least as far as the federal Communications Act's nondiscrimination and public interest, convenience, and necessity requirements. MCI has failed to demonstrate how these two statutory provisions conflict at all. In any case, the only conflict that could conceivably arise would be in the context of an application of the Arkansas Act to a particular agreement.

III. The Arkansas Act's Provisions Concerning Rural Telephone Companies are Completely Compatible with Federal Requirements

Both the Arkansas Act and the federal Communications Act exempt rural telephone companies from interconnection, unbundling, and resale requirements that would otherwise apply to incumbent LECs until these companies have received a "bona fide request" for such services and until the State commission has determined that certain other conditions have been satisfied.[20] The Arkansas Act expressly provides that the Arkansas PSC must make this determination "in accordance with the Federal Act."[21] MCI nevertheless argues that the Arkansas Act must be preempted on the grounds that it imposes certain conditions on lifting the exemption that are not found in the Communications Act.

The Arkansas Act requires the Arkansas PSC to find by "clear and convincing evidence" that the bona fide request for service meets certain conditions before the PSC may require a rural LEC to fulfill the request.[22] In contrast, the Communications Act specifies no burden of proof. Yet nothing in the Communications Act prohibits a State from requiring a heightened level of

---

[20]Arkansas Act § 10; 47 U.S.C. § 251(f).

[21]Arkansas Act § 10(a).

[22]Id. § 10(b).

proof before lifting the exemption for rural LECs. There is, therefore, no conflict on the face of the statutes.

Furthermore, there is no conflict between the Arkansas Act and this Commission's regulations in the First Report and Order. This Commission expressly declined in the First Report and Order "to adopt national rules or guidelines regarding other aspects of section 251(f),"[23] leaving it to the States and to their commissions to decide on a case-by-case basis whether lifting the exemption is "likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry."[24] In section 10(c) of the Arkansas Act, the Arkansas General Assembly simply provides guidance to its own PSC concerning what it means for a request to be "unduly economically burdensome" and "technically feasible," as those terms are used in the Communications Act.[25] Unless and until the Arkansas PSC rejects a bona fide request from MCI to terminate the exemption for a rural LEC, MCI simply has nothing to complain about. There is no reason for MCI or this Commission to assume that the Arkansas PSC will violate applicable federal law in carrying out its responsibilities under section 10 of the Arkansas Act.

IV. The Arkansas Provisions Relating to Universal Service are Consistent with Applicable Requirements Under Federal Law

As SWBT made clear in both its initial comments and its reply comments on ACSI's preemption petition, the Arkansas Act and the federal Communications Act provide for two,

---

[23] First Report and Order, supra note 9, at 16,118 [¶ 1263].

[24] Id. [¶ 1262].

[25] Arkansas Act § 10(c); see 47 U.S.C. § 251(f)(1)(A).

distinct universal service funding mechanisms. The Arkansas Universal Service Fund ("AUSF") was designed "to provide predictable, sufficient, and sustainable funding to eligible telecommunications carriers serving rural or high cost areas of the State."[26] This is precisely what Congress anticipated: "A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms."[27] There are differences in the ways the AUSF and the federal universal service support mechanisms are administered, but these differences are not inconsistencies.

A. Section 4 is Not Inconsistent with Federal Universal Service Provisions

The Arkansas Act requires the Arkansas PSC to replace any "reasonably projected change in revenues" occasioned by changes in federal policy that effect an incumbent LEC's universal service fund revenues by increasing the rates for basic local service and/or by increasing the incumbent LEC's recovery from the AUSF.[28] This furthers the General Assembly's intent to "[r]ecognize that a telecommunications provider that serves high cost rural areas or exchanges faces unique circumstances that require special consideration and funding to assist in preserving and promoting universal service."[29]

---

[26]Arkansas Act § 4(a).

[27]47 U.S.C. § 254(f).

[28]Arkansas Act § 4(e)(4)(A).

[29]Id. § 2(2).

MCI asserts that this provision of the Arkansas Act conflicts with provisions of section 254 requiring the universal service fund to be administered in a competitively neutral manner.[30] The Arkansas Act allegedly violates this principle because it makes no provision "for [incumbent LECs'] competitors to receive additional funding, even if they are identically situated to the ILEC."[31] But in Arkansas, there are no "identically situated" telecommunications providers with the universal service obligations of the incumbent LECs. Until such time as a competitor to an incumbent LEC assumes comparable universal service obligations and has its "federal universal service fund revenues" curtailed by an order of this Commission "pursuant to Section 254(a)(2) of the Federal Act," then — and only then — will such a competitor be in a position to claim that it, too, should be entitled to a replacement of "the reasonably projected change in revenues."

MCI next asserts that the Arkansas Act "expressly precludes considerations of cost when calculating universal service funding received by ILECs" under section 4, in conflict with this Commission's determination that the proper measure of cost for determining the level of federal universal service support is the forward-looking economic cost of constructing and operating relevant network facilities and functions.[32] But MCI badly misreads the relevant provision of the Arkansas Act. Section 4(e)(4)(C) simply provides that changes in how the AUSF is administered for purposes of replacing any reductions in federal universal service support "shall not be

---

[30]MCI Petition at 14; see Report and Order, In re Federal-State Joint Board on Universal Service, FCC 97-157, CC Docket No. 96-45, ¶¶ 47-48 (May 8, 1997) ("Universal Service Order").

[31]MCI Petition at 14.

[32]Id. (citing Univeral Service Order, supra note 30, ¶¶ 224-231).

conditioned upon any rate case or earnings investigation by the [Arkansas] Commission."[33] Instead, it is the Administrator of the AUSF who "shall verify the calculations and accuracy of the net revenue reductions."[34] In contrast to MCI's suggestion, the Arkansas Act clearly contemplates cost-based methods for determining state funding eligibility levels for high cost areas: eligible communications carriers have the option of using "traditional rate case methods and procedures to identify universal service revenue requirements";[35] methods for calculating "fully distributed allocation of cost and identification of associated revenue";[36] or "reasonable cost proxies."[37] This Commission has not yet decided on a cost methodology for determining support for rural, insular, and high cost areas;[38] MCI cannot seriously argue that the Arkansas Act's cost-based methods for calculating appropriate levels of support from the AUSF conflict with methodologies that have not yet been adopted and that, even when adopted, will determine support levels from an entirely different fund.

B. Section 5 is Not Inconsistent with Federal Provisions Governing Eligible Telecommunications Carriers

MCI argues that section 5 of the Arkansas Act conflicts with provisions under the Communications Act governing the conditions for becoming a telecommunications carrier eligible

---

[33]Arkansas Act § 4(e)(4)(C) (emphasis added).

[34]Id.

[35]Id. § 4(e)(6)(A).

[36]Id. § 4(e)(6)(B).

[37]Id. § 4(e)(6)(C).

[38]Universal Service Order, supra note 30, ¶ 245.

to receive universal service support. Specifically, MCI argues that the conditions for eligibility under the Arkansas Act are inconsistent with those specified in section 214(e) of the Communications Act.

Once again, MCI completely misunderstands the relationship between the AUSF and the federal universal service fund. In its Universal Service Order, this Commission has recently concluded that, although section 214(e) precludes states from imposing additional eligibility criteria for receiving funding from the federal universal service support mechanism,

> it does not preclude states from imposing requirements on carriers within their jurisdictions, if these requirements are unrelated to a carrier's eligibility to receive federal universal service support and are otherwise consistent with federal statutory requirements. Further, section 214(e) does not prohibit a state from establishing criteria for designation of eligible carriers in connection with the operation of that state's universal service mechanism, consistent with section 254(f).[39]

Section 5 of the Arkansas Act exclusively governs a carrier's eligibility to receive high cost support from the AUSF; it has absolutely nothing to do with the conditions for receiving federal universal service support.

All of the supposed inconsistencies identified by MCI between section 5 of the Arkansas Act and section 214(e) of the Communications Act are nothing but different rules governing different funds. Congress not only recognized that a State "may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State,"[40] but it ensured that states would have the flexibility to impose, on a competitively neutral basis,

---

[39]Universal Service Order, supra note 30, ¶ 136.

[40]47 U.S.C. § 254(f).

"requirements necessary to preserve and advance universal service."[41] Of course, if a state refuses to designate an additional eligible carrier for federal universal service support on grounds other than the criteria in section 214(e), this could have the effect of prohibiting the ability of that carrier to provide a telecommunications service and may not be necessary to preserve universal service. But MCI has not even sought to be designated an eligible telecommunications carrier in Arkansas under section 214(e). Whether it will be refused such a designation; whether such a refusal has the effect of prohibiting it from providing a telecommunications service; and whether such a refusal is unnecessary to preserve universal service in Arkansas are questions that simply cannot be answered in the abstract. They certainly cannot be answered by mounting a facial challenge to a provision having absolutely nothing to do with federal universal service. MCI's claims with respect to section 5 are groundless.

V. The Arkansas PSC is Entirely Capable of Carrying Out its Responsibilities Under Federal Law

MCI repeats the argument originally made by ACSI that this Commission's authority under section 252(e)(5) to step in whenever a State commission "fails to act" gives it the power now to preempt the Arkansas PSC's jurisdiction over all arbitrations under section 252. As SWBT explained in its initial and reply comments, there can be no preemption under section 252(e)(5) unless and until the Arkansas PSC "fails to act."[42] This Commission has made clear that no one may invoke section 252(e)(5) without filing "a detailed written petition, backed by affidavit, that will, at the outset, give the Commission a better understanding of the issues

---

[41] Id. § 253(b).

[42] SWBT Comments on ACSI Petition at 14-16; SWBT Reply Comments on ACSI Petition at 5.

involved and the action, or lack of action, taken by the state commission. Allowing less notification increases the likelihood that frivolous requests will be made."[43]

The Arkansas Act contains explicit instructions to the Arkansas PSC that it is to carry out its responsibilities "[c]onsistent with the Federal Act";[44] "to the extent required by the Federal Act";[45] "as provided in Sections 251 and 252 of the Federal Act";[46] "as permitted by the Federal Act";[47] and "pursuant to Section 252 of the Federal Act."[48] MCI asserts, for example, that the Arkansas PSC "cannot, consistent with state law, require additional unbundling beyond that prescribed in the First Report and Order, even if that unbundling would be required by the general requirements of § 251 of the 1996 Act."[49] MCI does not cite any support for this assertion because it is simply not true: Section 9(d) provides that, "[e]xcept to the extent required by the Federal Act and this Act, the Commission shall not require an incumbent local exchange carrier to . . . sell unbundled network elements to a competing local exchange carrier."[50] There is nothing in the Arkansas Act requiring the Arkansas PSC to limit the range of unbundled elements to those

---

[43]First Report and Order, supra note 9, at 16,128-29 [¶ 1287].

[44]Arkansas Act § 9(a) (granting of certificates of convenience and necessity).

[45]Id. § 9(d) (obligations to negotiate over interconnection, unbundled network elements, and resale); id. § 9(h) (access to operator services, directory listings, and 911).

[46]Id. § 9(f) (PSC authority with respect to interconnection, resale, and unbundling is limited to terms, conditions, and agreements between incumbent LEC and competing LEC).

[47]Id. § 9(g) (approving resale restrictions).

[48]Id. § 9(j) (arbitration of open issues).

[49]MCI Petition at 20.

[50]Id. § 9(d).

expressly delineated by the Commission in the First Report and Order; indeed, the Arkansas PSC has already directed SWBT to make available "elements" that were not required to be unbundled in this Commission's First Report and Order.[51]

MCI is evidently unhappy that the Arkansas General Assembly does not share its view that the development of competition in local exchange markets requires going beyond the requirements of the federal Communications Act. Instead, the General Assembly has enacted a law that "[p]rovide[s] for a system of regulation of telecommunications services, consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms, modifies outdated regulation, eliminates unnecessary regulation, and preserves and advances universal service."[52] MCI's dissatisfaction with the Arkansas Act simply cannot justify the extent to which it has mischaracterized the nature of the relationship between the state and federal statutory schemes.

---

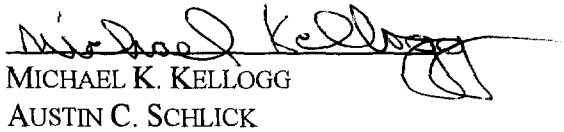
[51] See Arkansas Attorney General Comments on ACSI Petition at 10; SWBT Reply Comments on ACSI Petition at 4.

[52] Arkansas Act § 2(1) (emphasis added).

CONCLUSION

For the foregoing reasons, and for the reasons presented in SWBT's initial and reply comments on ACSI's petition, SWBT requests that the FCC deny MCI's petition for declaratory ruling.

Respectfully submitted,



MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
GEOFFREY M. KLINEBERG
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

MARTIN E. GRAMBOW
1401 I Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 326-8868

GARRY S. WANN
1111 West Capitol, Room 1005
P.O. Box 1611
Little Rock, AR 72203
(501) 373-5676

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
One Bell Center, Room 3520
St. Louis, MO 63101
(314) 235-4300

Of Counsel:

JAMES D. ELLIS
ROBERT M. LYNCH
175 E. Houston, Room 1262
San Antonio, TX 78205
(210) 351-3300

Attorneys for Southwestern Bell Telephone Company

July 7, 1997

CERTIFICATE OF SERVICE

I, Geoffrey M. Klineberg, hereby certify that on this seventh day of July, 1997, a true and correct copy of the foregoing Comments of Southwestern Bell Telephone Company was served by hand or by first-class, United States mail, postage prepaid, upon each of the following:

WINSTON BRYANT
DAVID R. RAUPP
VADA BERGER
KELLY S. TERRY
200 Catlett-Prien Tower Building
323 Center Street
Little Rock, AR 72201

GEORGE HOPKINS
P.O. Box 913
804 E. Page Avenue
Malvern, AR 72104

CHARLES C. HUNTER
CATHERINE M. HANNAN
Hunter Communications Law Group
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

LEON M. KESTENBAUM
KENT Y. NAKAMURA
NORINA T. MOY
1850 M Street, N.W., Suite 1110
Washington, D.C. 20036

ROBERT A. MAZER
ALBERT SHULDINER
ALLISON YAMAMOTO
Vinson & Elkins, L.L.P.
1455 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-1008

BENJAMIN H. DICKENS, JR.
GERARD J. DUFFY
Blooston, Mordkofsky,
Jackson & Dickens
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

RILEY M. MURPHY
CHARLES H.N. KALLENBACH
American Communications Services, Inc.
131 National Business Parkway, Suite 100
Annapolis Junction, MD 20701

BRAD E. MUTSCHELKNAUS
DANNY E. ADAMS
MARIEANN Z. MACHIDA
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, D.C. 20036

MARK C. ROSENBLUM
ROY E. HOFFINGER
STEPHEN C. GARAVITO
AT&T Corporation
295 N. Maple Avenue, Room 3249J1
Basking Ridge, NJ 07920

AMY G. ZIRKLE
LISA B. SMITH
MCI Communications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

JANICE MYLES
Common Carrier Bureau
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, D.C. 20554

ITS, INC.
1231 20th Street, N.W.
Washington, D.C. 20036